



STATE OF WISCONSIN Division of Hearings and Appeals

In the Matter of

Office of the Inspector General by Nadine Stankey, Petitioner

vs.

██████████ Respondent

DECISION

Case #: FOF - 168796

Pursuant to petition filed September 18, 2015, under Wis. Admin. Code §HA 3.03, and 7 C.F.R. § 273.16, to review a decision by the Office of the Inspector General by Nadine Stankey to disqualify ██████████ from receiving FoodShare benefits (FS) one year, a hearing was held on Thursday, November 5, 2015 at 09:15 AM at , Wisconsin.

The issue for determination is whether the respondent committed an Intentional Program Violation (IPV).

NOTE: Post hearing, OIG forwarded an unredacted copy of part of Exhibit 5, asking that it be added to the record.

7 C.F.R. §273.16 enumerates the Federal Regulations that State Agencies must follow, if they are going to disqualify a person from a food stamp program. The Federal Regulations have gone to great length to assure individuals' due process rights are protected when a State Agency seeks to disqualify a person from a food stamp program, like FoodShare. Indeed, there is a significant risk that an impoverished individual will be wrongly denied food, one of the most basic necessities of life, if due process is ignored. There is nothing in 7 C.F.R. §273.16, which allows the State Agency to make a post-hearing motion to supplement the record.

For this reason, and because the Respondent was not previously provided with the identity of her accuser, and because she was not given a previous opportunity to review the unredacted e-mail and respond, I did not grant OIG's motion to supplement the record post-hearing.

As is explained in more detail in the decision below, the unredacted e-mail would not have salvaged OIG's case.

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

Office of the Inspector General by Nadine Stankey
Department of Health Services
PO Box 309
Madison, WI 53701

Respondent:

██████████

[REDACTED]
[REDACTED]
ADMINISTRATIVE LAW JUDGE:
Mayumi Ishii
Division of Hearings and Appeals

FINDINGS OF FACT

1. The respondent (CARES # [REDACTED]) is a resident of Manitowoc County.
2. On October 1, 2015, the Office of Inspector General (OIG) prepared an Administrative Disqualification Hearing Notice alleging that the Respondent attempted to traffic FoodShare benefits on March 22, 2015. (Exhibit 1)

DISCUSSION

Respondent's Non-appearance

The Respondent did not appear for this hearing. This circumstance is governed by the regulation in 7 C.F.R. §273.16(e)(4), which states in part:

If the household member or its representative cannot be located or fails to appear at a hearing initiated by the State agency without good cause, the hearing shall be conducted without the household member being represented. *Even though the household member is not represented, the hearing official is required to carefully consider the evidence and determine if intentional Program violation was committed based on clear and convincing evidence.* If the household member is found to have committed an intentional program violation but a hearing official later determines that the household member or representative had good cause for not appearing, the previous decision shall no longer remain valid and the State agency shall conduct a new hearing. The hearing official who originally ruled on the case may conduct a new hearing. In instances where the good cause for failure to appear is based upon a showing of nonreceipt of the hearing notice, the household member has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. In all other instances, *the household member has 10 days from the date of the scheduled hearing to present reasons indicating a good cause for failure to appear. A hearing official must enter the good cause decision into the record.*

Emphasis added

The hearing in this case took place on November 5, 2015. The Respondent was advised of the date and time of the hearing, in an Administrative Disqualification Hearing Notice that was sent to her at an address on [REDACTED]. Ms. Stanky indicated that this was the Respondent's last known mailing address and that the agency did not receive any returned mail.

The notice instructed the Respondent to contact me to provide a number where she could be reached for the hearing. The Respondent did not call in with a phone number. Unsuccessful attempts were made to contact the Respondent at [REDACTED] and [REDACTED], and a voice mail message was left for the Respondent at the latter number.

The hearing took place in the Respondent's absence. The Respondent did not contact the Division of Hearings and Appeals within 10 days to explain her failure to appear. As such, it is found that the Respondent did not have good cause for her non-appearance.

What is an Intentional Program Violation (IPV)?

An intentional program violation of the FoodShare program occurs when a recipient intentionally does the following:

1. makes a false or misleading statement, or misrepresents, conceals or withholds facts;
or
2. commits any act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any Wisconsin statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of FoodShare benefits or QUEST cards.

FoodShare Wisconsin Handbook, § 3.14.1; *see also* 7 C.F.R. § 273.16(c) and Wis. Stat. §§ 946.92(2).

An intentional program violation can be proven by a court order, a diversion agreement entered into with the local district attorney, a waiver of a right to a hearing, or an administrative disqualification hearing, *FoodShare Wisconsin Handbook*, § 3.14.1. The petitioner can disqualify only the individual found to have committed the intentional violation; it cannot disqualify the entire household. Those disqualified on grounds involving the improper transfer of FS benefits are ineligible to participate in the FoodShare program for one year for the first violation, two years for the second violation, and permanently for the third violation. Although other family members cannot be disqualified, their monthly allotments will be reduced unless they agree to make restitution within 30 days of the date that the FS program mails a written demand letter. 7 C.F.R. § 273.16(b).

What is OIG's Burden of Proof?

In order for the petitioner to establish that an FS recipient has committed an IPV, it has the burden to prove two separate elements by clear and convincing evidence. The recipient must have: 1) committed; and 2) intended to commit a program violation per 7 C.F.R. § 273.16(e)(6). In *Kuehn v. Kuehn*, 11 Wis.2d 15 (1959), the court held that:

Defined in terms of quantity of proof, reasonable certitude or reasonable certainty in ordinary civil cases may be attained by or be based on a mere or fair preponderance of the evidence. Such certainty need not necessarily exclude the probability that the contrary conclusion may be true. In fraud cases it has been stated the preponderance of the evidence should be clear and satisfactory to indicate or sustain a greater degree of certitude. Such degree of certitude has also been defined as being produced by clear, satisfactory, and convincing evidence. Such evidence, however, need not eliminate a reasonable doubt that the alternative or opposite conclusion may be true. ...

Kuehn, 11 Wis.2d at 26.

Wisconsin Jury Instruction – Civil 205 is also instructive. It provides:

Clear, satisfactory and convincing evidence is evidence which when weighed against that opposed to it clearly has more convincing power. It is evidence which satisfies and convinces you that “yes” should be the answer because of its greater weight and clear convincing power. “Reasonable certainty” means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof. This burden of proof is known as the “middle burden.” The evidence required to meet this burden of proof must be more convincing than merely the greater weight of the credible evidence but may be less than beyond a reasonable doubt.

Further, the *McCormick* treatise states that “it has been persuasively suggested that [the clear and convincing evidence standard of proof] could be more simply and intelligibly translated to the jury if they were instructed that they must be persuaded that the truth of the contention is highly probable.” 2 *McCormick on Evidence* § 340 (John W. Strong gen. ed., 4th ed. 1992).

Thus, in order to find that an IPV was committed, the trier of fact must derive from the evidence, a firm conviction as to the existence of each of the two elements even though there may exist a reasonable doubt that an program violation occurred.

The Merits of OIG's Case

This case deals with an allegation of trafficking. Under 7 CFR §271.2, trafficking means:

- (1) The buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits issued and accessed via Electronic Benefit Transfer (EBT) cards, card numbers and personal identification numbers (PINs), or by manual voucher and signature, for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone;
- (2) The exchange of firearms, ammunition, explosives, or controlled substances, as defined in section 802 of title 21, United States Code, for SNAP benefits;
- (3) Purchasing a product with SNAP benefits that has a container requiring a return deposit with the intent of obtaining cash by discarding the product and returning the container for the deposit amount;
- (4) Purchasing a product with SNAP benefits with the intent of obtaining cash or consideration other than eligible food by reselling the product, and subsequently intentionally reselling the product purchased with SNAP benefits in exchange for cash or consideration other than eligible food; or
- (5) Intentionally purchasing products originally purchased with SNAP benefits in exchange for cash or consideration other than eligible food.
- (6) Attempting to buy, sell, steal, or otherwise affect an exchange of SNAP benefits issued and accessed via Electronic Benefit Transfer (EBT) cards, card numbers and personal identification numbers (PINs), or by manual voucher and signatures, for cash or consideration other than eligible food, either directly, indirectly, in complicity or collusion with others, or acting alone.

This definition became effective November 19, 2013.¹ The previous definition of trafficking did not include attempted trafficking.

OIG alleges that the Respondent went to the grocery store on March 22, 2015, approached a customer and offered to use her EBT card to pay for the customer's groceries, in exchange for cash. OIG has not met its burden of proof.

In order to prove this occurred, OIG relied upon an e-mail dated March 23, 2015, that it claims is from an alleged customer, and that was forwarded to an alleged cashier at the store, who forwarded the e-mail to an individual who identified himself at a loss prevention associate from the grocery store. There is nothing about that string of hearsay statements that lends the statements an indicia of reliability. Further, that customer from whom the complaint originates does not identify the individual who approached her, nor does the cashier.

¹ <https://www.federalregister.gov/articles/2013/08/21/2013-20245/supplemental-nutrition-assistance-program-trafficking-controls-and-fraud-investigations>

OIG provided a CD of surveillance video footage, however, it contains no audio, so there is no way to know what is being said between the people in the video. In addition, there was no one at the hearing who could identify the individuals in the video, nor explain what was happening in the video.

OIG provided a driver's license for the Respondent, but the photocopy is of too poor quality to use for comparison purposes. OIG also provided Facebook photos, which have their own authentication issues and are not that great for comparison purposes. The bigger problem is again the video. The video quality is not good enough to say definitively that the person in the video is the same individual in the Facebook photo. The same is true of the child in the video that OIG claims is the child in one of the Facebook photos.

For all the foregoing reasons, OIG has not met its burden to prove, by clear and convincing evidence, that the Respondent attempted to traffic her benefits on March 22, 2015.

CONCLUSIONS OF LAW

OIG has not met its burden to prove, by clear and convincing evidence, that the Respondent attempted to traffic her benefits on March 22, 2015.

NOW, THEREFORE, it is ORDERED

That IPV claim number [REDACTED] is hereby reversed.

REQUEST FOR A REHEARING ON GROUNDS OF GOOD CAUSE FOR FAILURE TO APPEAR

In instances where the good cause for failure to appear is based upon a showing of non-receipt of the hearing notice, the respondent has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. See 7 C.F.R. sec. 273.16(e)(4). Such a claim should be made in writing to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

APPEAL TO COURT

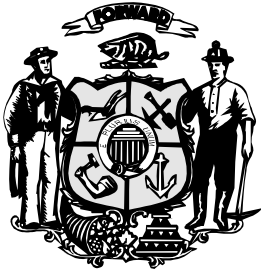
You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, WI 53703, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing request (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Milwaukee,
Wisconsin, this 24th day of November, 2015

\sMayumi Ishii
Administrative Law Judge
Division of Hearings and Appeals

c: Office of the Inspector General - email
Public Assistance Collection Unit - email
Division of Health Care Access and Accountability - email
Nadine Stankey - email



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on November 24, 2015.

Office of the Inspector General
Public Assistance Collection Unit
Division of Health Care Access and Accountability
NadineE.Stankey@dhs.wisconsin.gov